No. 98-229 (3)

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

FUTURA DEVELOPMENT OF PUERTO RICO, INC.,

Petitioner,

against,

ESTADO LIBRE ASOCIADO DE PUERTO RICO,
THE COOPERATIVE DEVELOPMENT ADMINISTRATION,
THE COOPERATIVE DEVELOPMENT COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## REASONS FOR GRANTING THE WRIT

### I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE WHETHER PEACOCK V. THOMAS PROHIBITS THE EXERCISE OF ANCILLARY JURISDICTION WHEN THE ACTION INVOLVES A PARTY FOUND TO BE AN ALTER EGO OF THE ORIGINAL JUDGMENT DEBTOR AND FOUND TO BE A DE FACTO PARTY TO THE EARLIER LITIGATION

In its efforts to deflect this Court's attention from the important issue presented in this Petition for a Writ of Certiorari, the Commonwealth of Puerto Rico either ignores, or tries to cast doubt on, the two key factual findings made by the District Court and left undisturbed by the First Circuit: first, that the so-called "original judgment debtor," the Cooperative Development Corporation ("CDC"), was nothing more than a puppet of the Commonwealth, completely controlled both financially and administratively by the Commonwealth and its agency, AFC; and, second, that the Commonwealth was a de facto party to the litigation resulting in a judgment in favor of Futura and against CDC. What those findings mean in practical terms is that the Commonwealth was the party that committed the underlying wrong (a breach of contract) and was a party to the litigation resulting in a judgment remedying that wrong.

These factual findings are critical to an understanding of why Peacock v. Thomas, 516 U.S. 349 (1996), did not resolve the issue posed in this case and why the First Circuit, although feeling compelled to rule in the Commonwealth's favor, expressed concern that it might have read Peacock incorrectly. In Peacock, the plaintiff argued that, because of the individual defendant's post-judgment conduct, he should be held liable for an earlier judgment obtained against his

corporation. There was no finding, as there was here, that the defendant was a de facto party to the earlier litigation or that the defendant was a de facto judgment debtor at the time the judgment was rendered.[1]

In Peacock, this Court repeatedly made reference to that distinction, emphasizing that "the facts relevant to this complaint are limited to allegations that Peacock shielded Tru-Tech's assets from the ERISA judgment long after Tru-Tech's plan had terminated;" that "the alleged wrongdoing in this case occurred after the ERISA judgment was entered;" and that "this is a new action based on theories of relief that did not exist, and could not have existed, at the time the court entered judgment in the ERISA case." Id. at 356, 358-59 (emphasis added).

If the critical factor is whether the "alleged wrongdoing" occurred before or after the entry of judgment, then the First Circuit was wrong in interpreting Peacock to preclude the exercise of jurisdiction in this case. This is so because, under the undisturbed factual findings, the Commonwealth, as the controlling alter ego of CDC, the technical judgment debtor, and as a de facto party to the

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[1] In Peacock, a former employee had sued Tru-Tech and Peacock, an officer of Tru-Tech, in an ERISA action alleging breach of fiduciary duty. The action against Peacock was dismissed on the ground that he was not an ERISA fiduciary and judgment was ultimately entered against Tru-Tech. The second action claimed that, after judgment was entered, Peacock fraudulently conveyed assets of Tru-Tech to avoid paying the judgment, and, under a "piercing the corporate veil" theory, that Peacock was liable under ERISA, a claim this Court rejected on substantive grounds. 516 U.S. at 351-52. There was never a claim, as in this case, nor was there a finding, that Peacock was the de facto party to the original litigation.

earlier litigation, was a "person" liable under the judgment from the moment it was entered.

Peacock, however, is not altogether clear. As the Commonwealth itself recognizes (Brief in Opposition at 13-14), Peacock can also be read as precluding ancillary jurisdiction whenever there is a "subsequent lawsuit" to enforce a judgment against a third party, even though jurisdiction might exist if the plaintiff sought to enforce the judgment through a Rule 69 supplementary proceeding. If that is the meaning of Peacock, then whether or not the third party committed the wrongdoing before judgment was entered, and whether or not the plaintiff is seeking to enforce the judgment against the third party based on a pre-existing theory of liability, are essentially irrelevant. All that matters is whether the claim is asserted in a subsequent lawsuit.

Because it is by no means self-evident that this Court intended Peacock to reach that far, the First Circuit, unequivocally (and not enigmatically, as the Commonwealth contends), invited this Court to review this case.

Peacock is a new decision, but that does not mean it cannot or should not be revisited. If Peacock is read as broadly as the First Circuit felt compelled to read it, as this case amply demonstrates, it can lead to "unjust consequences." (App. 19) This case, where the equities are clear, provides a perfect opportunity for this Court to clarify the parameters of the ancillary jurisdiction doctrine.

## II. THE ELEVENTH AMENDMENT QUESTION IS SQUARELY PRESENTED IN THIS CASE AND SHOULD BE DECIDED BY THIS COURT

The Commonwealth asks this Court to refuse review of the very important and highly controversial question of whether the Commonwealth of Puerto Rico is "one of the United States" protected by the Eleventh Amendment. According to the Commonwealth, resolution of that issue is not necessary to disposition of the case. (Brief in Opposition at 15) The Commonwealth is wrong.

The First Circuit, in addressing supplemental jurisdiction, divided Futura's claims into two categories: those involving the Commonwealth's pre-judgment activities, which the Court found did not share a "common nucleus of operative facts" with the claims against the individuals (involving their post-judgment, illegal, stripping of the assets and identity of CDC), and those arising out the Commonwealth's post-judgment activities. (App. 13-14) The Court, noting that Futura had emphasized the pre-judgment relationship between the Commonwealth and CDC because that was "its only chance to penetrate Puerto Rico's Eleventh Amendment immunity" (App. 13), did not address the post-judgment claims because "the Eleventh Amendment would, for reasons, already explained, render us powerless to grant Futura any relief against the Commonwealth." (App. 14)

Plainly, were the Eleventh Amendment not viewed as a bar to any action by Futura based on the Commonwealth's post-judgment activities, the First Circuit would have had to carefully examine whether the post-judgment claims asserted by Futura, which are virtually identical to the claims asserted against the individuals, "derive from a common nucleus of operative fact" and are such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding."

United Mine Workers v. Gibb, 383 U.S. 715, 725 (1966). Indeed, if this Court were to decide that the Commonwealth is not entitled to Eleventh Amendment immunity, it would be necessary to remand to the First Circuit to decide the supplemental jurisdiction question in the first instance.

Moreover, if the Court grants review of the Peacock question, in the interest of judicial economy, it should grant review of the Eleventh Amendment question as well. Were the Court to determine that there is ancillary jurisdiction in this case, the case would have to be remanded to the First Circuit to address the Commonwealth's Eleventh Amendment arguments, which the First Circuit avoided when it dismissed the claim against the Commonwealth on jurisdictional grounds. (App. 16, n.6) Unless the First Circuit found a waiver, based on its prior rulings, the Court would likely hold that the Eleventh Amendment was a bar to Futura's suit. Valuable judicial resources would be wasted were the issue to go back to the First Circuit only to return to this Court for resolution later on.

Finally, as the Commonwealth points out, this Court has extended the reach of the Eleventh Amendment beyond its text in order to protect the immunity of States. But it is quite another matter to decide that the Commonwealth of Puerto Rico is "one of the United States." The issue for this Court is whether the text of the Amendment can be stretched that far.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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